# IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 7 OF 2006

SHRI TUSHAR L. S. USGAONKAR AND ANR., ....Appellants

Versus

SHRI AYUB KHAN, PONDA-GOA. ....Respondent

Mr. Sudesh Usgaonkar, Advocate for the Appellants.

Coram:- N. A. BRITTO, J.

Date:- 5th June, 2006

ORAL ORDER

This is defendants' second appeal arising from R.C.S. No. 73/94.

2. Heard Shri Sudesh Usgaonkar, the learned Counsel on behalf of the appellants/defendants.

3. The plaintiff had filed the said suit for permanent injunction to restrain the defendants from demolition of the suit house or dispossessing the plaintiff from the suit plot on the allegation that the defendants on or about 18/21 May, 1994, had interfered with their possession. The case of the plaintiff was that the plaintiff's father had constructed a house in the year 1976 in the property of late Kazi Peersab with his consent. The said Kazi Peersab according to the plaintiffs, was the owner of the property known as "Mossobata", surveyed under no. 3(Old) and 14(New) at Ponda Town, which was inherited by the said Kazi Peersab. Subsequently, the plaintiff entered into an Agreement of Sale dated 06.04.1993 with the said Kazi Peersab and agreed to purchase plot no. A 44 admeasuring 200 square metres, in which the said hut was situated.

4. On the other hand, it was the case of the defendants that they had an agreement with one Lalitprabha Asgaonkar dated 22.03.1994, by which, the defendant no.1 had agreed to purchase land adjoining the property under Survey no.14/0 forming part of new Survey no. 209/0, which was renumbered as 209/1 and that when the defendant no.1 had found that the structure of the plaintiff was constructed in Survey no.209/1, he had objected to the same. The learned trial Court framed two issues. The first was whether the plaintiff proves that his late father constructed a hut in the property of late Kazi Peersab with his consent in respect of the plot of land bearing no. A-44 admeasuring 200 square metres in survey no. 14/0 New, known as Mossobhat situated at Khadpaband, Ponda? The second issue was whether the defendant proves that the plaintiff had illegally and by trespassing in the land under Survey no. 209/1 has erected a structure? The learned Trial Court, after analysing the evidence produced by the plaintiff, came to the conclusion that the plaintiff had proved issue no.1 and the defendants have failed to prove issue no.2 and, therefore, proceeded to decree the Suit and restrain the defendants from dispossessing the plaintiff from the suit plot situated in the said property "Mossobata" surveyed under no.3 (Old) or 14(New) of Ponda Town.

5. The defendants filed an appeal before the District Court, Panaji and the learned Addl. District Judge by her Judgment dated 13.10.2005,came to the conclusion that the plaintiff had failed to prove that the suit plot/suit house lies in survey no. 14/0 and, therefore, the question of the defendants adducing evidence in its rebuttal does not arise. The learned Appellate Court also came to the conclusion that the learned Trial Court had not touched the said aspect of the matter and on the contrary had misdirected himself by observing that it was a specific case of the defendants that the suit plot falls in survey no. 209/1 and, therefore, the burden to place evidence as to the location of the suit plot by examining the expert was on the defendants and not on the plaintiff and hence non-examination of the expert by the plaintiff in no way, leads to invoke adverse inference against

the plaintiff. However, the fact remains that both the Courts below have rejected the evidence of D.w.2, an expert examined by the defendants to prove that the suit house or the suit plot claimed by the plaintiff was part of the property surveyed under no.209/1, agreed to be purchased by them from the said Lalitprabha Asgaonkar. At the same time, the learned Appellate Court allowed the appeal and modified the Judgment/Decree of the trial Court dated 13.05.2004. This modification was done after the learned First Appellate Court came to the conclusion that the plaintiff was in settled possession of the suit plot/suit house since 1976. I have perused the substantial questions of law formulated on behalf of the defendants at Para 16(a) to (d) of the Memorandum of Appeal. Much criticism was levelled on the finding of the Appellate Court that the defendants had admitted that the plaintiff were in possession of the suit house/suit plot from the year 1976 when according to learned Advocate Shri Usgaonkar, that was the case which was disputed by the defendants. However, what is to be noted is the fact the defendants came to know about the existence of the suit structure of the plaintiff only after the defendant no.1 executed an agreement of sale dated 22.03.1994 with the said Lalitprabha Asgaonkar. The plaintiff had led evidence of himself and two other witnesses who had stated that the plaintiff's father had constructed the suit house in the year 1976 and not only that the house was also situated in survey no. 14(New). The learned first Appellate Court might have observed that there was no convincing evidence that the suit house constructed by the father of the plaintiff along with the suit plot, agreed to be purchased vide Agreement dated 06.04.1983, fell in Survey no. 14(New) of Ponda Town. Nevertheless, both the Courts below, had come to a clear finding that the plaintiff was in possession of the said hut/plot, from the year 1976. On the other hand, the defendant had failed to prove on a specific issue framed in that regard and also evidence led in support of the same that the said house/plot claimed by the plaintiff fell in survey no. 209/1 of Ponda Town. The plaintiffs having been in settled possession of the said plot/house, were certainly entitled to protect their possession from the whole world including the defendant except the true owner and that is a well settled proposition of law. In other words, a

plaintiff in possession could resist interference from the defendant/s who had no better title. In the light of the above, I find that no substantial questions of law arise in this second appeal much less as formulated otherwise arise in this appeal. In this context, I may refer to a recent Judgment of the Apex Court in the case of Gurudev Kaur and Ors. v. Kaki & Ors. 2006 AIR SCW 2404, wherein the Apex Court has observed that the rationale behind allowing a second appeal on a question of law is, that there ought to be some Tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one Court whose rulings will be binding on all Courts, Tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher Courts have autority to make binding decisions on question of law. The Apex Court has also referred to a number of Judgments of that Court and further observed that despite repeated declarations of law by the judgments of that Court and the Privy Council for over a century, still the scope of Section 100 has not been correctly appreciated and applied by the High Courts in a large number of cases. The Apex Court also referred to the case of Santosh Hazari v. Purshottam Tiwari (2001) 3 SCC 179, wherein the Apex Court explained as what is a substantial question of law.

In my view, none of the questions formulated are substantial questions of law. Both the Courts having come to the conclusion that the plaintiff was in settled possession of the house/plot, the plaintiff was certainly entitled to protect the said possession. It could be disturbed only in accordance with law. There is no merit in this Second Appeal and, therefore, the same is hereby dismissed in limine.

N. A. BRITTO, J.

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